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REMARKS

Claims 53 and 54 are canceled from the application by this amendment. Upon entry of the amendment, claims 1-32, 34-38, 42-43, 45-46, 52, and 55-81 are pending in the application. New claim 81 was added and is essentially claim 54 rewritten in independent form. Claims 55 and 56 have been amended to accommodate the change in their base claim from claim 53 to claim 81.

No new matter is added to the application by these amendments.

Applicant would initially like to thank the Examiner for the early indication of allowable subject matter in claims 62-80. Such indication should prove useful in expediting the prosecution of the application.

Reconsideration and reexamination of the application is respectfully requested.

Rejections under 35 USC §112, ¶1

The Examiner has rejected claims 46 and 59 under 35 U.S.C. § 112, ¶ 1, as allegedly containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor, at the time the application was filed, had possession of the claimed invention. The rejection of claims 46 and 59 is respectfully traversed.

The basis for the objection is that the alternative locations for the frictional material and/or bumps on the sleeve instead of the collar were described and claimed, but not shown in a drawing. The addition of Figs. 13 and 14 now show the frictional material and bumps on the sleeve as originally described and claimed.

Specifically, Paragraph 40 has been amended to contain reference to new Fig. 14, which shows a strip of rubber extending annularly around the interior of the sleeve. Original Paragraph 40 in describing Fig. 10 stated that a frictional material 72 can be added to the collar. Original Paragraph 40 said the frictional material could be rubber. Original Paragraph 40 also said that such a frictional material could be added to the sleeve, but no drawing showed the frictional material on the sleeve. New Fig. 14 shows the frictional material 72 applied to the sleeve overlap area 36 along its interior surface as described in original Paragraph 40. Thus, amended

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paragraph 40 and Fig. 14 show a rubber material on the interior surface of the sleeve, obviating the basis for the objection. Since original Paragraph 40 discloses the structure in Fig. 14, no new matter has been added by these amendments.

Original Paragraph 42 has been amended to contain a reference to new Fig. 13, which shows a plurality of annular ribs extending inwardly from the sleeve inner surface. Original Paragraph 42 and Fig. 12 disclose a plurality of annular protrusions or embossments extending outwardly from the collar 90 and stated the same can be used on the sleeve. Amended Paragraph 42 now states that the bumps 92 can also be provided on the inner surface 41 of the sleeve 16 such as the bumps shown in Fig. 13. Thus, paragraph 42 and Fig. 13 show bumps extending inwardly from the interior surface of the sleeve, obviating the basis for the objection. Since the bumps on the sleeve are described in original Paragraph 42, no new matter has been added by these amendments.

Rejections under 35 USC §102(e)

The Examiner has rejected claims 53 and 55-61 under 35 U.S.C. § 102(e) as allegedly being anticipated by U.S. Patent No. 6,305,656 to Wemyss. Claims 55-61 depend from independent claim 53. This rejection is respectfully traversed.

Finality of the Rejection is Improper

Initially, Applicant traverses the treatment of this Office Action as final. The Examiner has rejected claims 53 and 55-61 under 35 U.S.C. §102 and claim 54 under 35 U.S.C. §103 based upon references not previously of record (U.S. Patent No. 6,305,656 to Wemyss and U.S. Patent No. 3,809,353 to Good et al.). Claims 52-61 were added in response to the first Office Action and never amended. Section 706.07(a) of the Manual of Patent Examining Procedure provides that an action on the merits will not be made final if it includes a rejection of an unamended claim in spite of the fact that other claims may have been amended to require newly cited art. Also, an action on the merits should not be made final if it includes a rejection, on prior art not of record, of any claim amended to include limitations which should reasonably have been expected to be claimed.

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Applying these standards to claims 53 and 55-61 clearly shows the finality of the rejection is premature and improper. Claim 53 calls for the sleeve with at least one longitudinal slot, which is essentially the limitation of claim 51 placed in direct dependency on claim 39, without the intervening limitations from dependent claims 44 and 45. Thus, the combination of elements found in claim 53 form a claim with limitations that should have been reasonably expected by the Examiner. The removal of the intervening limitations from dependent claims 44 and does not alter the reasonableness that the Examiner should have expected the combination of elements. Since the claim elements were found in the claims prior to the first Office Action and are now in a new combination, the Examiner should have reasonably expected the combination and the finality of the rejection of the claims on new references is improper.

Substance of the Rejection

Claim 53 has been canceled from the application without prejudice, rendering its rejection moot. Claims 55-61 now depend directly or indirectly from claim 81, which in addition to other limitations, calls for the sleeve bottom wall to have an air passage extending therethrough. This limitation was previously found in claim 54.

The Wemyss patent discloses a magnetic coupler for holding various items from handheld electronic equipment to cups to the dash of a vehicle. In the cup holder embodiment shown in Figs. 4 and 5, the upper portion of the sidewall is tapered and internal ribs 56 are provided. The taper in combination with the ribs has two functions. First, they permit the cup holder to accommodate various cup sizes. Second, they permit condensation release through the gaps formed between the cup and the sidewall since the ribs prohibit the cup from contacting the sidewall. (Col. 9, lines 34-46). Figs. 19 and 20 disclose a variation to the cup holder that does not include flared sidewalls, but does have deep grooves 64 formed in the sidewall. In both embodiments, the bottom wall of the cup holder mounts one portion of the magnetic dash mount coupling.

Wemyss does not disclose the claimed opening in the bottom wall as called for by claim 81. Wemyss does not need such an opening because the ribs 56 keep the cup from contacting the wall, which will prevent the formation of a vacuum between the bottom of the cup and the cup holder upon removal. The location of a cup holder in the bottom wall of the Wemyss cup holder

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would also interfere with the magnetic coupling. Thus, Wemyss not only does not need such an opening in the bottom wall, Wemyss teaches away from such an opening in the bottom wall.

Since Wemyss does not disclose an air passage in the bottom wall it does not anticipate claim 81. Since claims 55-61 incorporate the limitations of claim 81, they likewise are not anticipated by Wemyss. Withdrawal of the anticipation rejection for claims 53 and 55-61 is respectfully requested.

Rejections under 35 USC §102(b)

The Examiner has rejected claims 43, 52, and 53 under 35 U.S.C. § 102(b) as being allegedly anticipated by U.S. Patent No. 3,592,501 to Stokes. Claims 52 and 53 are independent claims. Claim 43 depends from independent claim 52. This rejection is respectfully traversed.

The rejection of claim 53 is moot as it is canceled from the application.

For Stokes '501 to anticipate claims 52 and 43, each and every element of the claims must be found in Stokes. Since claims 52 and 43 recite elements not found in Stokes, the anticipation rejection must fail.

Stokes '501 discloses a cup holder having a handle 25, a supporting platform 11, and two arms 16, 17 for partially encircling the container being held. The cup holder of Stokes '501 has no frictional material on the interior of the arms 16, 17. The Examiner asserts that the piece of frictional material limitation of claim 52 is satisfied by the whatever frictional resistance is found on the surface of the material forming the Stokes cup holder. Such an interpretation of the limitation "piece of frictional material" is contrary to the use of the term in the application, which makes clear that the piece of frictional material is something other than the surface of the material forming the cup holder. The frictional material is an item provided on the surface that increases the frictional resistance between the sleeve and the cup to a greater amount than what is provided by the surface of the sleeve alone. Stokes '501 discloses no such frictional material.

It may be helpful to the Examiner to note that the term friction enhancer is used in the claims to generically reference any material or structure that improves or increases the friction between the sleeve/collar, as the case may be, and the cup as compared to the inherent frictional resistance of the sleeve/collar alone. The term frictional material is used to identify a subset of

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frictional enhancers that are pieces of material placed on the surface of the sleeve/collar to enhance the frictional resistance between the sleeve/collar and the cup. One example of a frictional material is a piece of rubber placed on the sleeve/collar.

The Examiner has rejected claims 42, 43, 45, and 52 under 35 U.S.C. § 102(b) as allegedly being anticipated by U.S. Patent No. 4,747,507 to Fitzgerald et al. Claims 42, 43 and 45 depend from independent claim 52. This rejection is respectfully traversed.

Fitzgerald '507 discloses a bottle holder having four inwardly-extending, resilient longitudinal ribs 18. The bottle holder comprises a single sleeve portion that is molded from a plastic to form a rigid structure. A castellated opening is formed in the bottom wall for receiving a traditional bottle cap and functions as a bottle opener.

It is asserted in the Office Action that the ribs 18 satisfy the frictional material limitation. Such is not the case. As stated above with respect to Stokes, the frictional material is a subset of the claimed friction enhancers. The frictional material limitation covers material that is provided on the sleeve surface to increase the friction between the sleeve and the cup that would otherwise be found just between the surface of the sleeve and the cup. The frictional material limitation does not cover structural appendages integrally formed with the sleeve, which is made clear in the claims and in the written description.

Rejections under 35 U.S.C. §103(a)

Claim 54 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Wemyss '656 in view of U.S. Patent No. 3,809,353 to Good et al. This rejection is respectfully traversed.

Claim 54 is canceled from the application. However, claim 81 is essentially claim 54 rewritten in independent form. Therefore, the rejection of claim 54 will be addressed with respect to claim 81.

The obviousness rejection is not tenable because the combination is improper since Good '353 is non-analogous art. Good '353 is not within the same field of endeavor as the claimed sleeve. A protective end cap for a scuba air tank is not in the same field of endeavor as a sleeve for a cup. Further, Good '353 is directed to strengthening the bottom wall of an end cap by the use of spoke-like ribs against external impact. The claimed sleeve is directed to solving the problem of protecting a confectionary cup from internal punctures by supporting the sidewalls of

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the cup. Good '353 is not concerned with supporting the sidewalls of the air tank. Moreover, the air tank alone is inherently strong enough to avoid a puncture from an internal object. Since Good '353 is non-analogous art the combination fails, taking with it the basis for the rejection.

The obviousness rejection must further fail because it does not satisfy the requirements for a *prima facie* case of obviousness. To establish a *prima facie* case of obviousness, three basic criteria must be met:

- There must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings.
- There must be a reasonable expectation of success.
- The prior art reference must teach or suggest all the claimed limitations.

In re Vaack, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991). *See also*, MPEP 706.02(j) and 2143-2143.03. "When patentability turns on the question of obviousness, the search for and analysis of the prior art includes evidence relevant to the finding of *whether there is teaching, motivation, or suggestion to select and combine the references relied on as evidence of obviousness*. *See, e.g., McGinley v. Franklin Sports, Inc.*, 262 F.3d 1339, 1351-52, 60 USPQ2d 1001, 1008 (Fed. Cir. 2001) ("the central question is whether there is reason to combine [the] references," a question of fact drawing on the *Graham v. John Deere* factors) (*emphasis added*). Here, not only has the Examiner not proffered sufficient evidence contained in the references to support the alleged combination, but has offered *no* evidence of teaching, suggestion or motivation to combine the Wemyss '656 and Good '353 references. Rather, the Examiner leaps directly into the factual disclosures of each reference in the alleged combination without setting forth the reasons for combining them. Absent the Examiner identifying such motivation expressly contained in the references making up the combination, the Examiner's alleged combination is nothing but an exercise in impermissible prior-art-based hindsight reconstruction of Applicant's claimed invention. *See In re Dembiczak*, 175 F.3d 994, 999, 50 USPQ2d 1614, 1617 (Fed. Cir. 1999) ("Our case law makes clear that the best defense against the *subtle but powerful attraction of a hindsight-based obviousness analysis is rigorous application of the*

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requirement for a showing of the teaching or motivation to combine prior art references.")
(Emphasis added.)

There is nothing in either patent to suggest their combination. In fact, the Wemyss patent teaches away from making such a combination because a magnetic coupling device is mounted to its bottom wall and the ribs keep the cup spaced from the cup holder sidewall, which eliminates the formation of a vacuum, negating the need for an opening in the bottom wall. The Good '353 patent is not concerned with the formation of a vacuum in the bottom wall. Its openings exist to permit the flow of water out the opening. Thus, there is no teaching or suggestion to make the combination. The sole basis for the combination is hindsight reconstruction, which is improper.

Claim 46 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Fitzgerald '507 in view of U.S. Patent No. 1,868,773 to Staake. This rejection is respectfully traversed.

Initially, the rejection must fail because the combination is improper because Staake '773 patent is non-analogous art. Staake '773 discloses a rubber container for shipping an ice cream canister. It is not within the field of endeavor for the claimed sleeve. Nor is Staake '773 attempting to solve the same problem. An ice cream package shipping container is not within the field of endeavor of a sleeve for supporting a confectionary cup. Staake is also not related in any way to strengthening the side wall of a cup during the making of a confection. Staake is concerned with solving the problem of having a shipping container that can accommodate different sizes of ice cream packages or ice cream packages with varying or irregular shapes.

Assuming Staake is analogous art, the rejection must further fail in that the Examiner has once again made no showing of why a person of ordinary skill in the disposable cup holder art would be motivated to combine the molded plastic bottle holder of Fitzgerald '507 with the rubber ice cream shipping container as disclosed in Staake. In essence the combination would replace the molded plastic of Fitzgerald with rubber, which would make the molding of the Fitzgerald nearly impossible. Further, the substitution of rubber for the plastic in Fitzgerald would render the entire cup holder deformable, which is a requirement of Staake. The deformable nature of the resulting cup holder is contrary to the teaching of Fitzgerald, which requires the bottom to be rigid so that it can receive a bottle cap in the castellated opening for

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removing castle-shaped bottle caps from the bottle. The castellated opening is the key patentable feature of Fitzgerald and making the bottle holder of Fitzgerald from rubber like Staake destroys the functionality of Fitzgerald. Therefore, there is no teaching or suggestion to make the combination as asserted.

Even if the combination of Fitzgerald and Staake could be made, the resulting bottle holder made from rubber does not reach claim 46 which calls for a sleeve that has a piece of frictional material disposed on its inner surface. As previously described, the frictional material increases the friction between the sleeve and the cup as compared to the inner surface of the sleeve alone. The resulting combination only results in the entire inner surface made from the same material. Nothing in the resulting combination results in an increase in the friction over the material forming the inner wall. Therefore, claim 46 is not obvious in view of the alleged combination.

Claims 1-12, 19-29, 32 and 34-37 stand rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 1,035,718 to Marsters et al. in view of FR 1,437, 341. This rejection is respectfully traversed.

FR '341 discloses a cup 1 comprising a lid/baffle 5 and a cover 9 with a drinking spout 12. The lid/baffle 5 has a portion 6 that is received within the cup 1. The cover 9 has a portion 10 that is received within the top of the lid/baffle 5. A series of openings are formed in the lid/baffle 5 and retard the flow of liquid from the cup and into the cover 9 to prevent liquid from rapidly flowing out of the cup 1 and through the spout 12 when the cup is tipped for drinking. The FR '341 patent is akin to a child's sippy cup with a baffle for slowing the flow of liquid through the spout.

The combination of Marsters '718 and FR '341 is traversed on multiple grounds. First, the FR '341 patent is non-analogous art. The FR '341 patent is not within the field of Applicant's invention. The FR '341 patent is directed to spill-proof or spill resistant cups and is not a confection cup assembly or any part of a confection cup assembly. The FR '341 patent is not directed to solving the same problem as Applicant's invention: the retardation of the tendency of the cup to rotate in a sleeve. The problem solved by the FR '341 patent is that of spilling of the liquid from a cup.

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Second, assuming, *arguendo*, that the FR '341 patent is analogous art, then there is no teaching or suggestion to combine the references. Since the FR '341 patent only discloses a cup and no sleeve, there is no teaching or suggestion in the reference to add a sleeve to hold the cup. It is asserted in the Office Action that the collar of the FR '341 patent can be added to the Marsters patent. This position is not tenable in that there is no teaching or suggestion in either reference to make the combination. The Marsters patent does not need a collar to hold the cup in the cup holder. The addition of a collar to the Marsters patent is not even relevant to the function of the Marsters cup holder.

It is submitted that the only basis for attempting to add the collar of the FR '341 patent with the Marsters patent is that of hindsight reconstruction because a collar is needed to reach the claimed invention and a collar is not taught by the cited prior art.

If for some reason the combination could be made, it would, at best, teach the cup holder and cup of Marsters '718 with either the lid/baffle 5 or cover 9 closing the top of the Marsters cup. However, either of these approaches necessarily closes off the top of the cup of the Marsters cup since both the lid/baffle 6 and cover 9 are lids and not a collar as claimed. In other words, the alleged combination really teaches adding a lid to the Marsters cup and cup holder. Thus, the alleged combination does not have a collar as claimed since access cannot be made to the interior of the cup with the alleged combination.

Claims 14-16, 30, 38 stand rejected under 35 U.S.C. 103(a) as being obvious in view of the combination of Marsters '718 and FR '341 and further in view of U.S. Patent No. 2,284,625 to Smith et al. This rejection is respectfully traversed.

Smith '625 discloses a funnel-like object having a neck 24 that is received within the mouth of a bottle. The funnel-like object includes a seal/gasket on the neck to seal the funnel-like object with respect to the bottle upon insertion and permit one to drink from the bottle through the funnel-like object.

The addition of Smith '625 to the prior combination of Marsters '718 and FR '341 is traversed. As with the FR '341 patent, the Smith patent is non-analogous art. Smith '625 is nothing more than a drinking aid to enlarge the drink opening of a bottle and is in no way within the field of Applicants' invention of a confection cup assembly. Neither is Smith '625

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concerned with solving the problem of preventing the cup from rotating relative to the sleeve. Smith '625 solves the problem of how to drink from a bottle as if you were drinking from a cup.

Also, as with FR '341 there is no teaching or suggestion to add Smith '625 to the combination. The addition of Smith '625 to the combination appears to be based solely on the need to find some type of annular rib in an attempt to reach the claimed ribs, instead of any teaching or suggestion in the references themselves. This is classic hindsight reconstruction and is not permissible.

Moreover, the addition of Smith '625 does not address the shortcomings of the combination of Marsters '718 and the FR '341 patent. Therefore, the combination of Marsters '718, FR '341, and Smith '625 is not tenable because the underlying combination of Marsters '718 and FR '341 cannot be made for the reasons previously described.

Assuming, *arguendo*, that the alleged combination was made, it would disclose the previous combination with the gasket/rib of Smith '625 circumscribing the lid/baffle 5 or the cover 9 functioning as a lid for the cup and cup holder of Marsters '718. Such a combination does not disclose the claimed sleeve and collar of the claimed invention.

Claims 17 and 30 stand rejected under 35 U.S.C. 103(a) as being obvious over Marsters '718 in view of FR '341 and Smith '625 and further in view of Fitzgerald '507. The rejection is traversed.

The rejection fails because the underlying combination is not tenable for the reasons previously stated.

Fitzgerald '507 is also non-analogous art. It is a crown seal/bottle cap remover and is not within the same field of endeavor as the Applicants' invention. It is directed to the problem of removing a crown seal/bottle cap from the bottle and not to preventing the rotation of a cup in a sleeve.

Fitzgerald '507 is cited for disclosing ribs to retain the cup. A close reading of Fitzgerald '507 will disclose that the ribs perform no such function. Again, it appears that Fitzgerald '507 was added to combination in an attempt to reach the claims at issue without

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any teaching in the reference to make the combination as asserted. This is impermissible hindsight reconstruction.

Claims 1-7, 9-13, 19-24, 26-29, and 32-37 stand rejected under 35 U.S.C. 103(a) as being obvious over Marsters '718 in view of GB 20,625 to Schmiedeknecht. This rejection is respectfully traversed.

Schmiedeknecht '625 discloses an extension ring B for a cup to keep the consumer's lips from contacting the glass A.

The combination of Schmiedeknecht '625 with Marsters '718 is traversed. Schmiedeknecht '625, like the other references, is non-analogous art. It is not in the same field of endeavor as the Applicants' invention and it is directed to solving a totally different problem. Moreover, there is no teaching or suggestion to make the combination. Marsters '718 uses a disposable cup and would have no need for the sanitary extension ring disclosed in Schmiedeknecht '625. Likewise, there is no need for the Schmiedeknecht reference to include a disposable cup as shown in Marsters '718.

The combination is based solely on hindsight reconstruction. The Examiner has failed to provide a prima facie case of obviousness.

Claims 14-16, 30, 38 stand rejected under 35 U.S.C. 103(a) as being obvious over Marsters '718 in view of Schmiedeknecht '625 and further in view of Smith '625. This rejection is respectfully traversed. The rejection must fail because the combination is improper. The combination initially fails for the reasons stated above regarding the combination of Marsters '718 and Schmiedeknecht '625. The combination further fails in that, as described above, Smith '625 is non-analogous art. Additionally, there is no teaching or suggestion to make combine Smith '625 with either Marsters '718 or Schmiedeknecht '625, other than impermissible hindsight reconstruction.

Claims 17 and 30 stand rejected under 35 U.S.C. 103(a) as being obvious over Marsters '718 in view of Schmiedeknecht '625 and Smith '625 and further in view of Fitzgerald '507. This rejection is respectfully traversed. The combination initially fails for the reasons stated above regarding the combination of Marsters '718, Schmiedeknecht '625, and Smith '625. The combination further fails in that, as described above, Fitzgerald '507 is non-analogous art.

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Additionally, there is no teaching or suggestion to make combine Fitzgerald ' 507 with either Smith '625, Marsters '718 or Schmiedeknecht '625, other than impermissible hindsight reconstruction.

All of the claims in the application are allowable over the prior art of record for the reasons stated above. Early notification of allowability is respectfully requested.

Respectfully submitted,

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Appendix A

(Amended) [0040] FIG. 10 illustrates an alternative construction of the collar. The alternative collar 70 is substantially identical to the collar 12 except that a thin layer of frictional material 72 is disposed about the periphery of the insert portion 20, preferably along the portion of the insert portion forming part of the overlap area 34. The frictional material 72 can be rubber or any other material that increases the frictional resistance between the insert portion 20 of the collar 12 and the interior of the cup 14. The frictional material 72 will improve the tendency of the confection cup 14 to remain stationary relative to the collar 12 and the sleeve 16 during the mixing of the confection ingredients. It is within the scope of the invention for at least the insert portion 20 of the collar 12 to be made from a material that is highly frictional instead of the addition of a separate friction layer or coating. ~~The~~ As shown in FIG. 14, the frictional material 72 can also be applied to the sleeve overlap area 36. Similarly, the sleeve 16 can be made entirely from a frictional material with sufficient rigidity.

(Amended) [0042] FIG. 12 illustrates a second alternative construction of the collar. The second alternative construction of the collar 90 is identical to that of the collar 12 except for the addition of a series of bumps, protrusions, or embossments 92 extending outwardly from the exterior surface of the insert portion 20. The bumps 92 function in a manner similar to that of the ribs 82 of the sleeve 80. The bumps 92 abut and depress a portion of the inner surface of the confection cup 14 to retard the tendency of the confection cup 14 to spin relative to the collar 12. The bumps 92 can also be provided on the inner surface 41 of the sleeve 16. 16 such as the annular ribs shown in FIG. 13.

55. (Amended) The sleeve according to claim ~~53~~81, wherein the sleeve body tapers in a direction away from the open top.

56. (Amended) The sleeve according to claim ~~53~~81, and further comprising a friction enhancer provided on the sleeve.